

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 14, 2009 Session

WESTERN EXPRESS, INC. v. BRENTWOOD SERVICES, INC. ET AL.

Appeal from the Chancery Court for Davidson County
No. 07-1040-III Ellen Hobbs Lyle, Chancellor

No. M2008-02227-COA-R3-CV - Filed October 26, 2009

Western Express, which was one of twenty-nine members of a workers' compensation self-insurance group trust established pursuant to Tenn. Code Ann. § 50-6-405(c), appeals the dismissal of its civil action against the former administrator of the now liquidated self-insurance group trust, Brentwood Services, Inc. Plaintiff's claims were dismissed pursuant to Tenn. R. Civ. P. 12.02(6) for failure to state a claim upon which relief may be granted. The Trust was liquidated in a separate liquidation proceeding wherein the Commissioner of the Department of Commerce and Insurance served as the Liquidator. A settlement entered into between the Liquidator and Brentwood, which resolved all claims common to the members of the Trust, was approved by the Chancery Court and entered in the liquidation action. Following the settlement of the liquidation action, Plaintiff filed this civil action against Brentwood to assert claims Plaintiff believed to be personal or unique to Plaintiff and which were not barred by the Liquidator's settlement with Brentwood. Thereafter, Brentwood filed a Tenn. R. Civ. P. 12.02(6) motion to dismiss for failure to state a claim upon which relief could be granted, contending that the claims asserted by Plaintiff were not personal or unique to Plaintiff, but common to all members of the trust, and that all such claims had been resolved in the liquidation action; alternatively, Brentwood asserted that any claims that were unique to Plaintiff were not sufficiently pled and, thus, should be dismissed. The trial court granted Brentwood's motion, dismissing all claims based upon the reasoning submitted by Brentwood. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and RICHARD H. DINKINS, J., joined.

Isham B. Bradley, Nashville, Tennessee, for the appellant, Western Express, Inc.

Tara L. Swafford and Wendee Hilderbrand, Nashville, Tennessee, for the appellees, Brentwood Services, Inc. and Brentwood Services Administrators, Inc.

OPINION

This action arises from the operation and court-assisted liquidation of a workers' compensation self-insurance group trust established and regulated pursuant to Tenn. Code Ann. § 50-6-405(c). Under the statute and the applicable Department of Commerce and Insurance regulations, a group of ten or more employers in the same trade are permitted to form a pool to self-insure all members collectively against workers' compensation claims.

In compliance with the statute, Western Express, Inc. ("Plaintiff") and twenty-eight other trucking companies pooled together to establish the Tennessee Trucking Association Self Insurance Group Trust ("Trust"). Brentwood Services, Inc. and Brentwood Services Administrators, Inc. (collectively, "Brentwood") provided certain administrative services to the Trust pursuant to a contract with the Trust. Brentwood did not have individual contracts with any of the Trust members.

In December 2002, a Department of Commerce and Insurance examiner issued a report identifying deficiencies in the administration of the Trust. Over a year later, the Commissioner of the Department of Commerce and Insurance used the Examiner's Report as a basis for filing a petition in Davidson County Chancery Court seeking to liquidate the Trust under Tenn. Code Ann. § 56-9-101, *et seq.* The chancellor granted the petition to liquidate the Trust and appointed the Commissioner to serve as the Liquidator. The Liquidator was granted all the rights and authority set forth in Tenn. Code Ann. § 56-9-301, *et seq.* Among the rights and authority granted to the Liquidator, by court order and statute, was the assumption of any causes of action belonging to the Trust and the authority to prosecute or settle legal claims belonging to the Trust or its members. Also pursuant to the statute, the court's order expressly enjoined and prohibited Trust members from bringing their own suits against the Trust or initiating any other legal actions that might interfere with the Liquidation case or the Trust's rights and assets.

During the liquidation case, the Liquidator pursued certain claims against Brentwood arising out of Brentwood's contract to provide administrative services to the Trust. Brentwood countered with its own claims against the Trust. Ultimately, the Liquidator and Brentwood entered into a court-approved settlement agreement. Under the terms of the settlement agreement, the Liquidator released all claims against Brentwood in exchange for a \$215,000 settlement payment.

Six months after approving the settlement agreement, the Chancellor addressed third-party claims filed against Brentwood by the trustees of the Trust. Two of the issues presented were whether any third-party claims against the Trust fell outside of the authority of the Liquidator and the scope of the settlement agreement between the Liquidator and Brentwood. The Chancellor found that "Tennessee law does not vest a liquidator with the authority to settle personal claims, and it accords individual claimants the right to pursue these purely personal causes of action," and, therefore, the Chancellor determined that claims which were personal or unique to a member of the Trust could be pursued by that member, but claims which were common to all members of the Trust

were within the exclusive authority of the Liquidator and could not be separately pursued by individual members of the Trust.

Plaintiff filed this action in the Williamson County Chancery Court in August 2006 to pursue its separate and unique claims against Brentwood. Shortly thereafter, the parties agreed to transfer this action to the Davidson County Chancery Court which had presided over the liquidation proceeding. Brentwood filed its Answer to the Complaint on September 21, 2007. Thereafter, Brentwood filed its Tenn. R. Civ. P. 12.02(6) motion to dismiss wherein Brentwood contended, *inter alia*, that Plaintiff's claims were not personal or unique to Plaintiff but rather claims held in common by the Trust and its members. The chancery court entered an order, *sua sponte*, allowing Plaintiff to amend its complaint to "provide more detailed factual allegations concerning its fraud claim and more detailed factual allegations concerning how its alleged cause of action and damages are personal to it and are not claims and damages common to the trust." Plaintiff filed an Amended Complaint on June 20, 2008. Three days later, Brentwood filed a renewed Motion to Dismiss.

On August 15, 2008, the chancery court entered an order dismissing all but three of Plaintiff's claims. In the same order, the court requested additional briefing on the three remaining claims, fraud, misrepresentation, and negligence, before ruling on those claims. After the parties submitted additional briefs, the court entered a handwritten order, adopting the "reasoning and authorities of [Brentwood's] July 23, 2008 Supplemental Memorandum of Law and their August 15, 2008 Supplemental Memorandum," and dismissing Plaintiff's Amended Complaint "in its entirety." This appeal followed.

Plaintiff presents two issues on appeal. First, Plaintiff contends that the trial court erred in considering the Settlement Agreement from the Trust Liquidation action. Second, Plaintiff contends the trial court erred in dismissing its complaint for failure to state a claim upon which relief could be granted. We will address each issue in turn.

ANALYSIS

SETTLEMENT AGREEMENT

The trial court dismissed the Complaint upon a Tenn. R. Civ. P. 12.02(6) motion to dismiss for failure to state a claim upon which relief could be granted. The failure to state a claim upon which relief can be granted is determined by an examination of the complaint *alone*. *Wolcotts Fin. Servs. Inc. v. McReynolds*, 807 S.W.2d 708, 710 (Tenn. Ct. App. 1990) (emphasis added). Plaintiff argues on appeal that the Settlement Agreement entered into by the Liquidator and Brentwood should not have been considered in a Rule 12.02(6) motion to dismiss for failure to state a claim. Specifically, Plaintiff objects to the Settlement Agreement because "it was not part of the pleadings and it was not an Order entered by the Chancery Court in a related case." Thus, Plaintiff argues the matter should have been converted into a Rule 56 motion for summary judgment.

As this court recently explained in *Indiana State District Council of Laborers v. Brukardt*, there are exceptions to this rule:

There are exceptions to the above rule, and the appellee contends that these exceptions apply here. The exceptions are reflected as follows:

Numerous cases, as the note below reflects, have allowed consideration of matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned; these items may be considered by the district judge without converting the motion into one for summary judgment.

Wright and Miller, *Federal Practice and Procedure, Civil* § 1357, p. 376 (3d ed.2004). The above, as noted, is reflected in numerous court decisions and is well recognized. *See, e.g., Wyser-Pratte Management Inc. v. Telxon Corp.*, 413 F.3d 553, 560 (6th Cir.2005) (“In addition to allegations in the complaint, the court may also consider other materials that are integral to the complaint, are public records, or are otherwise appropriate for taking judicial notice”); *Rothman v. Gregor*, 220 F.3d 81, 88-89 (2d Cir.2000) (court may consider SEC disclosure documents without converting motion to dismiss to summary judgment).

Ind. State Dist. Council of Laborers v. Brukardt, No. M2007-02271-COA-R3-CV, 2009 WL 426237, at *8 (Tenn. Ct. App. Feb. 19, 2009) (perm. app. denied Aug. 24, 2009).

Based on the exception to the rule above, we find that the Settlement Agreement was properly considered as it is a public record of which the court could take judicial notice. As part of the record in the liquidation action, which Plaintiff references in his Complaint, the trial court did not err by considering the Settlement Agreement when deciding whether to dismiss Plaintiff’s complaint for failure to state a claim upon which relief can be granted.

RULE 12.02 MOTION TO DISMISS

The purpose of a Tenn. R. Civ. P. 12.02(6) motion to dismiss is to determine whether the pleadings state a claim upon which relief can be granted. A Rule 12 motion only challenges the legal sufficiency of the complaint. It does not challenge the strength of the plaintiff’s proof. *See Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.*, 986 S.W.2d 550, 554 (Tenn. 1999). In reviewing a motion to dismiss, we must liberally construe the complaint, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences. *See Pursell v. First American National Bank*, 937 S.W.2d 838, 840 (Tenn. 1996); *see also Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 696-97 (Tenn. 2002). Thus, a complaint should not be dismissed for failure to state a claim *unless* it appears that the plaintiff can prove no set of facts

in support of his or her claim that would warrant relief. *See Doe v. Sundquist*, 2 S.W.3d 919, 922 (Tenn. 1999); *Fuerst v. Methodist Hospital South*, 566 S.W.2d 847, 848 (Tenn. 1978) (emphasis added). Making such a determination is a question of law. Our review of a trial court's determinations on issues of law is de novo, with no presumption of correctness. *Frye v. Blue Ridge Neuroscience Center, P.C.*, 70 S.W.3d 710, 713 (Tenn. 2002); *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000); *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997).

In this case, the trial court dismissed all of Plaintiff's claims adopting the reasoning of Brentwood Services in its July 23, 2008 Supplemental Memorandum of Law and its August 15, 2008 Supplemental Memorandum. The crux of Brentwood Services' argument in its motion to dismiss was that the claims asserted by Plaintiff were common claims that the Liquidator asserted on behalf of the Trust, and not "personal" claims. Thus, it contends Plaintiff was barred from bringing these claims in a subsequent action by both case law and the order of the trial court. Plaintiff, however, contends that the causes of action pled in its complaint assert personal actions with injuries unique to it, and thus, the trial court erred in dismissing its claims.

COMMON CLAIMS

The claims asserted by Plaintiff arise from the actions of Brentwood Services in its administration of the Trust. Following the liquidation of the Trust, in which the Commissioner served as the Liquidator, an action was filed against Brentwood Services by the Liquidator on behalf of the members of the Trust. The Liquidator brought these actions based upon the statutory authority granted by Tenn. Code Ann. § 56-9-310 which provides the liquidator with the authority to:

(8) Collect all debts and moneys due and claims belonging to the insurer, wherever located, and for this purpose to:

(A) Institute timely action in other jurisdictions, in order to forestall garnishment and attachment proceedings against such debts;

(B) Do such other acts as are necessary or expedient to collect, conserve or protect its assets or property, including the power to sell, compound, compromise or assign debts for purposes of collection upon such terms and conditions as the liquidator deems best; and

(C) Pursue any creditor's remedies available to enforce the liquidator's claims;

....

(14) *Continue to prosecute and institute in the name of the insurer, or in the liquidator's own name, any and all suits and other legal proceedings*, in this state or elsewhere, and abandon the prosecution of claims the liquidator deems unprofitable to pursue further. If the insurer is dissolved under § 56-9-309, the liquidator shall

have the power to apply to any court in this state or elsewhere for leave to substitute the liquidator for the insurer as plaintiff;

(15) *Prosecute any action which may exist in behalf of the creditors, members, policyholders or shareholders of the insurer against any officer of the insurer, or any other person;*

Tenn. Code Ann. § 56-9-310(a)(8)(A)-(C), (14)-(15) (2004) (emphasis added).¹

Thus, according to the provisions of the statute, the Liquidator had the *sole* authority to assert claims on behalf of the Trust. *See* Tenn. Code Ann. § 56-9-307(a) (“The liquidator shall be vested by operation of law with the title to all of the property, contracts *and rights of action*. . . .”) (emphasis added).

Neither party has cited, and we have not found, any Tennessee cases directly on point concerning the preclusive effect of a settlement by a liquidator that prosecuted claims on behalf of members of an insurance trust such as this, or on the right of an individual member to commence and maintain claims that are common to the members of the Trust. Brentwood Services, however, cited several cases that were relied upon by the trial court, and which we find persuasive, that support the trial court’s determination that Plaintiff is barred from asserting claims against Brentwood Services that were common to the membership of the Trust.

In the Matter of the Liquidation of American Mutual Liability Insurance Company, 632 N.E.2d 1209 (Mass. 1994), the Supreme Judicial Court of Massachusetts addressed the question of whether the Commissioner of Insurance appointed as receiver of an insolvent insurance company had the exclusive authority to assert and settle the claims of the insurance company. In the case, the Commissioner had been appointed pursuant to the governing statutes as receiver with the authority to take possession and control of the insurance company, American Mutual, which had become insolvent. *Id.* at 1210. Following an investigation into the reasons for American Mutual’s insolvency, the Commissioner determined potential claims existed against the former certified accountant and auditor of American Mutual, and began negotiations to settle the claims. *Id.* at 1211. A proposed settlement agreement was reached between the parties in which the former accountant would pay a settlement amount in exchange for the release from liability on all claims “‘that she, acting either as Commissioner of Insurance or as Permanent Receiver on behalf of [American Mutual] or on behalf of [American Mutual] policyholders, claimants, and other creditors (including, without limitation, guaranty funds and insurance insolvency funds) has had, may now, or hereafter can, shall or may have.’” *Id.* Following a motion for the court to approve the settlement agreement, several State insurance guaranty funds and associations sought to intervene in the action in order to assert separate claims against the accountant, to conduct discovery, and to object to the settlement. *Id.* The motion to intervene was denied pending the response of a full court response on several

¹ While both parties cite to the 2008 version of the statute, the Commissioner was appointed as Liquidator in February 2004, and, therefore, we find that the 2004 statute is the applicable provision.

questions, one of which was the scope of the authority of the Commissioner to assert claims on for the insolvent insurer. *Id.*

The Massachusetts court first looked to the statutes under which the Commissioner's authority as receiver stemmed. *Id.* at 1212. These statutes, which are similar to Tennessee's, provided:

The receiver's authority emanates principally from G. L. c. 175, §§ 6 and 180C (1992 ed.). Section 6 authorizes the receiver appointed for an insolvent insurer "to take possession of all the property and effects of the company, to settle its affairs, and to distribute its assets, subject to such rules and orders as the court may prescribe." Section 180C provides that, after entry of a liquidation order and "subject to the approval of the court, [the receiver] may sell or otherwise dispose of the real and personal property, or any part thereof, and sell or compromise all choses in action, of the company." In conformity with these statutes, there was entered in the county court an order of liquidation which directed the receiver, "to liquidate [American Mutual] as provided in and subject to [G. L. c. 175, § 180C], to take possession of, with the authority to transfer and control, the property, records, accounts, and effects of [American Mutual], to settle the affairs and distribute the assets of [American Mutual] subject to such rules and orders as the Court or some Justice hereof may prescribe."

Id. The court then held that the Commissioner as receiver had the exclusive authority to assert and settle claims against the accountant, such as those that the accountant had provided negligent services causing American Mutual to become insolvent. *Id.* The court reasoned that the pertinent statute conferred upon the receiver "broad authority to 'settle its affairs,'" and the statute expressly allowed the receiver "to 'compromise *all* choses in action.'" *Id.* The court noted that an alternate result would "undermine the reasonably specific and broad language" of the statute and "create a potential morass of lawsuits involving the receiver, and potentially up to fifty funds, in which many seek to assert, as a representative of American Mutual, the latter's claims against [the accountant] for alleged negligent services." *Id.* at 1213.

The court further determined, however, that the receiver's sole authority to assert claims was only in regards to "common claims":

"The weight of authority makes it clear that a statutory receiver, such as the [receiver] here, may prosecute claims on behalf of creditors and policyholders of the insolvent [insurance] company in order to preserve its estate assets, but may not maintain a suit in such a representative capacity if it is strictly personal in nature, that is, if the cause of action belongs clearly to the individual creditor or policyholder." *Matter of the Liquidation of Integrity Ins. Co.*, 240 N.J. Super. 480, 491, 573 A.2d 928 (App. Div. 1990). See *Corcoran v. Frank B. Hall & Co.*, *supra* at 177 (receiver has authority to prosecute claims on behalf of creditors); *Foster v. Peat Marwick Main & Co.*, *supra*

at 151-155 (insurance commissioner, as rehabilitator of insolvent insurer, had authority to assert claim against insurer's auditor on behalf of insurer, all policyholders and insurers, creditors, and interested parties alleging malpractice, breach of contract, and misrepresentation).

Id. The court then looked to the Texas case of *Cotten v. Republic Nat'l Bank*, 395 S.W.2d 930 (Tex. Civ. App. 1965), for guidance in the distinction between common claims and personal claims. *Id.* In *Cotten*, the court "held that a receiver could sue to recover assets for an insolvent insurer on behalf of creditors and policyholders, but could not maintain a suit as the representative of a policyholder or creditor who claimed that he or she had been induced by fraud to invest in the insurer." *American Mutual*, 632 N.E.2d at 1213. In so finding, the court in *Cotten* explained:

Certainly a receiver for an insolvent insurance corporation . . . has a right to maintain a suit which is necessary to preserve the corporation's assets and to recover assets of which the corporation has been wrongfully deprived through fraud. In such a suit the receiver may be said to sue as the representative of the corporation and its creditors, stockholders and policyholders, for they have an interest in the corporation's assets and upon liquidation they are entitled to a proper distribution of the assets.

But some actions for fraud are by their nature personal to each creditor, or each stockholder, or each policyholder, and the receiver may not then maintain a suit in his representative capacity for their joint benefit. In such case each claimant and he alone may bring and maintain the suit himself, for the action is personal, separate and several, not joint, and extends no further than the individual loss of each particular creditor who sues. For example, one who proves that he relied on false representations as to the corporation's financial condition and was thereby induced to extend credit to the corporation, or to purchase stock in it, or to take out an insurance policy with it, must in his own name maintain a separate suit for his damages against the person who uttered the fraudulent representations. The aggrieved party and he alone may maintain the suit.

Cotten, 395 S.W.2d at 941. The Massachusetts court then noted that while it had not been asked to rule on what constituted a valid personal claim, it appeared that the claim asserting the accountant's negligent auditing practices was a common claim. *American Mutual*, 632 N.E.2d at 1214 n.7.

Another case cited by both Brentwood Services and Plaintiff provides further guidance in the inquiry regarding what constitutes a common claim. In *Boedeker v. Rogers*, the Ohio Court of Appeals addressed the issue of whether the Ohio statute which authorized the Superintendent of Insurance to assume responsibility over a liquidated insurer's affairs also authorized the Superintendent to be substituted as a plaintiff in an action by shareholders of the insurer who were asserting both derivative claims on behalf of the corporation and individual claims on behalf of shareholders. *Boedeker*, 746 N.E.2d 625, 628 (Ohio Ct. App. 2000). Under Ohio's statutory scheme, the Superintendent, acting as liquidator, was authorized to "prosecute any and all claims and other

legal proceedings of the insurer.” *Id.* The court found this included the derivative claims asserted by the shareholders on behalf of the corporation, because these actions were “asserted on behalf of the corporation to right an alleged wrong done to the corporation.” *Id.* at 635. The court found that this conclusion supported the purpose of the statute:

The obvious intent of such a statutory scheme is to give the liquidator the sole authority to prosecute or abandon all legal rights of action that inure to the benefit of the insurer, including legal claims of the insurer’s creditors, members, policyholders or shareholders who look to the insurer for satisfaction. *See Four Star Insurance Agency, Inc. v. Hawaiian Electric Industries, Inc.* (1999), 89 Haw. 427, 974 P.2d 1017; *Corcoran v. Frank B. Hall & Co., Inc.* (1989), 149 A.D.2d 165, 545 N.Y.S.2d 278. Concentrating this authority in the hands of a liquidator serves to reduce the potential that a multiplicity of actions by claimants having antagonistic interests will deplete the insurer’s assets before the insurer’s obligations are fairly extinguished.

By necessity, the interests that shareholders or other interested parties may seek to protect will be limited to the interests they possess. The interests the Superintendent must represent, however, go beyond those of the immediately affected principals and include the interests of insurers, claimants, creditors, and the public generally. R.C. 3903.02(D). While the interests represented by shareholders and the interests represented by the Superintendent may be in harmony at times, their interests may become dissonant at other times. *So that the liquidation process does not degenerate into cacophony and disarray, there can be only one conductor.*

Id. at 636 (emphasis added). The court stated, however, that the individual claims were different because a direct claim is “personal, separate, and distinct from that otherwise suffered in common by the corporation and its other shareholders.” *Id.* at 637.

Tennessee’s statutory scheme for dissolution of an insolvent insurer is similar to that of the states discussed in the opinions above, i.e., Massachusetts, Texas, and Ohio. In each of these states, and Tennessee, the liquidator is vested with the power to pursue claims against the company’s officers, and prosecute and institute all claims in the insurer’s name that the liquidator deems necessary. *See* Tenn. Code Ann. § 56-9-307(a), 310. Thus, we concur with the reasoning adopted by the trial court that the only claims which Plaintiff could pursue were claims not in common with those that were pursued or could have been pursued by the Liquidator. We find that Plaintiff has not alleged anything other than a common injury held by the Trust. Plaintiff had no individual contractual relationship with Brentwood Services from which to assert an individual breach of contractual relationship claim, and, while Plaintiff may contend that it was a third party beneficiary of the contract between the Trust and Brentwood Services, any injury incurred from a breach of the administrative services contract would be in common with the Trust, and, thus a common claim. This is equally true of Plaintiff’s claims for failure to adequately supervise and failure to perform fiduciary duties owed to the Trust.

We, therefore, affirm the trial court's conclusion that Plaintiff failed to state a claim for which relief could be granted for Brentwood Services' alleged failure to adequately supervise, failure to perform fiduciary duties, breach of contract, and negligence, as each and all of these claims are common to the members of the Trust. Accordingly, we affirm the dismissal of the above claims. We will now consider the individual claims asserted by Plaintiff.

INDIVIDUAL CLAIMS

While many of the claims asserted by Plaintiff were "common" claims that were in the sole discretion of the Liquidator, and thus, were properly dismissed, some claims asserted by Plaintiff involved claims that were unique to Plaintiff or "personal" in nature.

Plaintiff contends on appeal that it properly asserted claims that were personal to Plaintiff and, thus, the trial court erred in dismissing these claims. Brentwood Services contends, however, that even if Plaintiff is entitled to assert these claims, Plaintiff failed to properly plead them; thus, the "personal claims" were properly dismissed.

FRAUD AND MISREPRESENTATION

We agree that claims for fraud and misrepresentation could constitute claims that are personal in nature, and, thus could be asserted by Plaintiff. However, we find that these claims were not properly pled. Tenn. R. Civ. P. 9.02 states that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

A plaintiff must allege the following elements to assert a common law fraud claim: "(1) an intentional misrepresentation of a material fact, (2) knowledge of the representation's falsity, . . . (3) an injury caused by reasonable reliance on the representation [and (4) the requirement] that the misrepresentation involve a past or existing fact. . . ." *Dobbs v. Guenther*, 846 S.W.2d 270, 274 (Tenn. Ct. App. 1992). "A claim of fraud is deficient if the complaint fails to state with particularity an intentional misrepresentation of a material fact." *Hermosa Holdings, Inc. v. Mid-Tennessee Bone & Joint Clinic, P.C.*, No. M2008-00597-COA-R3-CV, 2009 WL 711125, at *10 (Tenn. Ct. App. Mar. 16, 2009) (citing *Dobbs*, 846 S.W.2d at 274). "To pass the particularity test, the actors should be identified and the substance of each allegation should be pled." *Id.* (citing *Strategic Capital Res., Inc. v. Dylan Tire Indus., LLC*, 102 S.W.3d 603, 611 (Tenn. Ct. App. 2002)).

We find that Plaintiff has not met this burden. The only allegations of fraud by Plaintiff are that Brentwood Services held "secret meetings" to conceal its failure to perform and failure to supervise, and that Brentwood Services' disregard of the "laws of the State of Tennessee, and the rules and regulations of the Department of Commerce and Insurance" was fraudulent. We find that these assertions are too vague to fulfill the pleading requirements imposed by Tenn. R. Civ. P. 9.02, and, thus the trial court properly dismissed Plaintiff's claims for fraud under Tenn. R. Civ. P. 12.02(6). *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("[A] plaintiff's obligation to

provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do).

For its misrepresentation claim, Plaintiff states that Western Services made representations that the Trust was in compliance, that Plaintiff relied on these representations when entering into the Trust and forgoing alternative opportunities for insurance, and that based upon these false representations Plaintiff incurred damages. The necessary elements to establish a cause of action based upon negligent misrepresentation are:²

One who, in the course of his business, profession, or employment, or during a transaction in which he had a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon such information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

McElroy v. Boise Cascade Corp., 632 S.W.2d 127, 130 (Tenn. Ct. App. 1982) (citing *Jasper Aviation, Inc. v. McCollum Aviation, Inc.*, 497 S.W.2d 240 (Tenn.1972); *Merriman v. Smith*, 599 S.W.2d 548 (Tenn. Ct. App.1979); *Hunt v. Walker*, 483 S.W.2d 732 (Tenn. Ct. App.1971)). “Statements of opinion or intention are not actionable,” nor, is “puffing or other sales talk.” *Id.* (citing *Sunderhaus v. Perel & Lowenstein*, 215 Tenn. 619, 388 S.W.2d 140 (1965)). We find that Plaintiff also failed to state a claim for which relief can be granted on its misrepresentation claim. Plaintiff does not allege who made the misrepresentations or when the misrepresentations were made, thereby failing to allege the required elements that a person in the course of his business supplied false information. Plaintiff’s allegation is simply too vague to set forth a misrepresentation claim, and, therefore, we affirm the chancery court’s dismissal of the claim under Tenn. R. Civ. P. 12.02(6).

TENNESSEE CONSUMER PROTECTION ACT

We also find that Plaintiff has failed to state a claim upon which relief can be granted for violations of the Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-101, *et seq.* One purpose of the Act is “[t]o protect consumers and legitimate business enterprises from those who engage in unfair or deceptive acts or practices in the conduct of any trade or commerce in part or wholly within this state.” Tenn. Code Ann. § 47-18-102(2); *see also ATS Southeast, Inc. v. Carrier Corp.*, 18 S.W.3d 626 (Tenn. 2000).

²Plaintiff does not specify whether it is asserting a claim for intentional misrepresentation or negligent misrepresentation. For purposes of this appeal, we shall evaluate the claim as one of negligent misrepresentation due to the fact a claim for intentional misrepresentation would fail to satisfy the pleading requirement of specificity, as was the case with Plaintiff’s claim of fraud.

Plaintiff asserts that Brentwood Services violated the Act based upon its misrepresentations and “active participation in the marketing maneuvers.” Plaintiff asserts that these actions violated § 47-18-104(7), which provides it is a violation to represent that “goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another,” and § 47-18-104(27), which provides that it is a violation to engage “in any other act or practice which is deceptive to the consumer or to any other person.” To the extent that Plaintiff asserts that Brentwood Services engaged in actions to conceal its improper administration, this would fall under the common claims discussed previously, as that would be an injury to the Trust as a whole and held commonly by other members of the Trust. To the extent that Plaintiff would be able to assert a claim for misrepresentations specifically targeted at Plaintiff, we find that Plaintiff has not properly pled this cause of action, despite being allowed an opportunity to amend its complaint by the trial court. Instead, Plaintiff does little more than make conclusory legal statements, as opposed to facts upon which to base its claim. This is not enough to state a claim upon which relief can be granted. First, we note that Plaintiff must also meet the pleading requirements set forth at Tenn. R. Civ. P. 9.02, which apply to claims brought under the Tennessee Consumer Protection Act. *See Harvey v. Ford Motor Credit Co.*, 8 S.W.3d 273, 276 (Tenn. Ct. App. 1999). Plaintiff’s vague assertions do not meet this standard, nor, do they meet the less stringent standards under Tenn. R. Civ. P. 8.01. Merely reciting the elements of a cause of action or making conclusory statements that Plaintiff is entitled to relief or was harmed is not enough. *See Twombly*, 550 U.S. at 555; *see also Polite v. Metropolitan Development and Housing Agency*, No. M2007-02472-COA-R3-CV, 2008 WL 3982915, at *3 (Tenn. Ct. App. Aug. 26, 2008) (“Alleging mere conclusions, such as the board exceeded its authority, failed to follow the applicable statutes, or violated the plaintiff’s legal rights, is not sufficient to state a claim for which relief can be granted.”). Therefore, we find that the trial court properly dismissed Plaintiff’s TCPA claim.

COMPENSATORY AND PUNITIVE DAMAGES

Plaintiff also asserts that it is entitled to compensatory damages for the amount of the Liquidator’s assessments against Plaintiff in the liquidation proceedings, and that it is entitled to compensatory and punitive damages based on the claims asserted in this action. Plaintiff’s claims for damages have been rendered moot by our decision in this case as the claims for damages cannot stand alone.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against Plaintiff/Appellant Western Express, Inc.

FRANK G. CLEMENT, JR., JUDGE